



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Sawyer County Human Services, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 206744

Pursuant to petition filed November 3, 2022, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Sawyer County Human Services to disqualify ██████████ from receiving FoodShare benefits (FS) for a period of one year, a hearing was held on Tuesday, December 20, 2022 at 10:30 AM at Wisconsin Rapids, Wisconsin.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Sawyer County Human Services
10610 Main Street
PO Box 730
Hayward, WI 54843

Respondent:

██████████
██████████
████████████████████

ADMINISTRATIVE LAW JUDGE:

Jason M. Grace
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Wood County who received FS benefits in Sawyer County from January, 2022 – September, 2022. She was part of a FS household of two. Members of the household were respondent and her child.
2. [REDACTED] received FS benefits as a household of one. He was the only person authorized to use his FS card.
3. Respondent and [REDACTED] have a child in common.
4. [REDACTED] was incarcerated in the [REDACTED] from June 7, 2022 until at least July 15, 2022. His FS card was used on multiple occasions during his period of incarceration.
5. The agency conducted an investigation into the FS usage during [REDACTED] period of incarceration. An investigator reviewed surveillance video footage from a Kwik Trip on July 6, 2022, showing a female using [REDACTED] FS card. That woman was identified as respondent based on a comparison with her social media profile picture. The identity of the woman was further confirmed by a neighbor of [REDACTED] who was shown the surveillance pictures by the agency's investigator. The neighbor also told the investigator that he works with the woman's sister.
6. On November 4, 2022, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent violated Fs rules by using [REDACTED] FS card while he was incarcerated.
7. The respondent failed to appear for the scheduled December 20, 2022 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.
8. Prior to the hearing in the instant matter, the agency representative spoke to [REDACTED] about his FS card usage while he was incarcerated. He indicated that he had given his FS card to respondent to use.
9. The respondent was mailed an Enrollment and Benefits Handbook on May 29, 2020 and November 17, 2020. That material notified her that an intentional violation of the FS program could result in being barred from the program. She was further informed that it was a FS program violation to use another person's FS benefits, card, or other documentation.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all

the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

In this case, respondent did not appear at the hearing. If the person suspected of the IPV (or his or her representative) cannot be located or fails to appear without good cause the hearing must be conducted without the IPV suspect being represented. 7 C.F.R. 273.16(e)(4).

"If the household member or its representative cannot be located or fails to appear at a hearing initiated by the State agency without good cause, the hearing shall be conducted without the household member being represented. Even though the household member is not represented, the hearing official is required to carefully consider the evidence and determine if intentional Program violation was committed based on clear and convincing evidence. If the household member is found to have committed an intentional Program violation but a hearing official later determines that the household member or representative had good cause for not appearing, the previous decision shall no longer remain valid and the State agency shall conduct a new hearing. The hearing official who originally ruled on the case may conduct the new hearing. In instances where good cause for failure to appear is based upon a showing of nonreceipt of the hearing notice . . . , the household member has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. In all other instances, the household member has 10 days from the date of the scheduled hearing to present reasons indicating a good cause for failure to appear. A hearing official must enter the good cause decision into the record." 7 C.F.R. § 273.16(e)(4) (2011).

The respondent did not present a good cause reason for failing to appear at the hearing. Therefore, the determination of whether respondent committed an FS IPV must be based solely on what the petitioner presented at the hearing.

The agency contended that the Respondent committed an IPV by using another individual's QUEST (FS) card while that individual was incarcerated. Respondent was not a member of that person's FS household. She was in fact receiving FS benefits in his own case.

Pursuant to federal regulation, eligible food program benefits may be used only by a FS household or by an individual the FS household selects to purchase eligible food for the household. 7 C.F.R. §274.7(a). Pursuant to state statute, no eligible person may transfer FS benefits expect to purchase food from a supplier or knowingly use FS benefits for which the person's household is not eligible. Wis. Stat. §946.92(2)(d). State statute also indicates that an "unauthorized person" is prohibited from knowingly using FS benefits. Wis. Stat. §946.92(2)(f). Consistent with the above-cited federal regulation and state statutes, FS policy states:

The cardholder is the only person that can make authorized purchases on the QUEST card, unless he or she verbally authorizes another person to make purchases on their behalf for their assistance group.

...

Example 4: Steve is a single FoodShare member who has been in jail for the last four months. Steve gives his QUEST card to a friend to use while he is in jail. His friend is not buying food for Steve, the person eligible for the FoodShare benefits. His friend is an unauthorized buyer, and both are guilty of committing fraud.

...

FoodShare Wisconsin Handbook §7.3.2.4.

The Enrollment and Benefits Handbook, which is provided to FS recipients, including respondent, indicates the following:

FoodShare Intentional Program Violation

Fraud or intentional program violations by a person in your household may result in his or her disqualification from FoodShare. This means the person will not be able to get FoodShare benefits:

- For one year after the first violation.
- For two years after the second violation.
- Permanently after the third violation.

Any member of the household who intentionally breaks any of the following rules can be barred from the FoodShare program for the time specified above:

- Trading, selling, buying, or altering FoodShare benefits, including the attempt to trade, sell, buy, or alter FoodShare benefits online and/or in person.
- Allowing another person to use your FoodShare benefits to purchase food that is not for your household.
- Returning items purchased with FoodShare benefits for cash or gift cards.
- Using FoodShare benefits to buy or trade for ineligible FoodShare items, like alcohol, tobacco, or rent.
- *Using another person's FoodShare benefits, identification card, or other documentation.*

[Emphasis added.] Exhibit 10 and found online at <https://www.dhs.wisconsin.gov/publications/p0/p00079.pdf>.

Here, the agency established that Respondent used the FS card of another FS recipient while that recipient was incarcerated. It is clear that Respondent's purchases were made for her own benefit and not on behalf of the card hold since he was incarcerated at the time. Respondent thereby violated FS program rules. The agency also established that Respondent, who had received FoodShare in her own case, was previously advised in writing on multiple occasions of the prohibition on using other people's FS cards and the penalties associated with FS program rule violations. It is thus reasonable to infer that Respondent understood she was violating FS program rules when she used benefits issued to someone else.

Based upon the record before me, I find that the petitioner has established by clear and convincing evidence that the respondent intentionally violated FS program rules, and that this violation was the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The Respondent violated, and intended to violate, 7 C.F.R. §274.7(a) and Wis. Stats. § 946.92(2).
2. The agency properly seeks to disqualify Respondent from the FoodShare program for a period of one year pursuant to 7 C.F.R. § 273.16(b)(1).

NOW, THEREFORE, it is

ORDERED

That the petitioner's determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

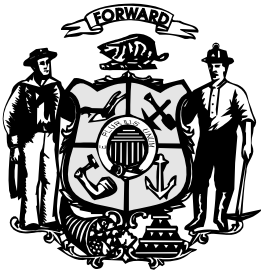
The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 6th day of January, 2023



\sJason M. Grace
Administrative Law Judge
Division of Hearings and Appeals

c: Northern Consortium - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Leanna Becker - email
Shawna White - email



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The preceding decision was sent to the following parties on January 6, 2023.

Sawyer County Human Services
Public Assistance Collection Unit
Division of Health Care Access and Accountability

[REDACTED]

[REDACTED]